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No. 04-1144

In The
Supreme Court of the United States

KELLY AYOTTE, ATTORNEY GENERAL
OF THE STATE OF NEW HAMPSHIRE,
IN HER OFFICIAL CAPACITY,

Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN
NEW ENGLAND, CONCORD FEMINIST HEALTH
CENTER, FEMINIST HEALTH CENTER OF
PORTSMOUTH, AND WAYNE GOLDNER, M.D.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

BRIEF AMICUS CURIAE OF NEW HAMPSHIRE LEGISLATORS IN SUPPORT OF PETITIONER AND IN SUPPORT OF REVERSAL

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE UNCERTAINTY REGARDING THE STANDARD OF REVIEW TO BE APPLIED TO FACIAL CHALLENGES OF ABORTION REGULATIONS THAT HAS PERSISTED FOR THIRTEEN YEARS	3
A. The Recent Decision of this Court in *Stenberg v. Carhart* Has Exacerbated this Uncertainty	4
B. Three Standards of Review are Currently Being Applied to Abortion Regulation by Lower Courts	6
II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE NECESSITY AND SCOPE OF A HEALTH EXCEPTION TO PARENTAL INVOLVEMENT LAWS	9
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES

A Woman's Choice – E. Side Women's Clinic v. Newman, 305 F.3d 684 (7th Cir. 2002), *cert. denied*, 537 U.S. 1192 (2003) 5, 6, 7

Ada v. Guam Society of Obstetricians & Gynecologists, 506 U.S. 1011 (1992) 4

Barnes v. Moore, 970 F.2d 12 (5th Cir. 1992) 6

Bellotti v. Baird, 443 U.S. 622 (1979) 2, 12

Causeway Med. Suite v. Ieyoub, 109 F.3d 1096 (5th Cir. 1997) 6

Fargo Women's Health Organization v. Schafer, 507 U.S. 1013 (1993) 4

Greenville Women's Clinic v. Comm'r, S.C. Dept. of Health & Envtl. Control, 317 F.3d 357 (4th Cir. 2002), *cert. denied*, 538 U.S. 1008 (2003) 7

H.L. v. Matheson, 450 U.S. 398 (1981) 12

Hodgson v. Minn., 497 U.S. 417 (1990) ..... *passim*

Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174 (1996) 4, 9

Jane L. v. Bangerter, 102 F.3d 1112 (10th Cir. 1996) 8

Lambert v. Wicklund, 520 U.S. 292 (1997) 2, 11

Manning v. Hunt, 119 F.3d 254 (4th Cir. 1997) 7

Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990) 3

Planned Parenthood of the Blue Ridge v. Camblos, 155 F.3d 352 (4th Cir. 1998) 2

TABLE OF AUTHORITIES – Continued

Page

Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127 (3d Cir. 2000) 7

Planned Parenthood of Del. v. Brady, 2003 WL 21383721 (D.Del. 2003) 8

Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908 (9th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3338 (U.S. Nov. 24, 2004) (No. 04-703) ... 8, 9, 11, 12

Planned Parenthood of Northern New England v. Heed, 390 F.3d 53 (1st Cir. 2004), *petition for cert. filed*, (U.S. Feb. 22, 2005) (No. 04-1144) 9

Planned Parenthood of Rocky Mountains Services, Corp. v. Owens, 287 F.3d 910 (10th Cir. 2002) 8, 9, 10, 11

Planned Parenthood, Sioux Falls Clinic v. Miller, F.3d 1452 (8th Cir. 1995), *cert. denied sub nom* 8

Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992) ..... *passim*

Planned Parenthood of S. Ariz. v. Lawall, 180 F.3d 1022 (9th Cir. 1999), *amended on denial of reh'g*, 193 F.3d 1042 (9th Cir. 1999) 7, 8

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 6

Rust v. Sullivan, 500 U.S. 173 (1991) 3

State Oil Co. v. Khan, 522 U.S. 3 (1997) 6

Stenberg v. Carhart, 530 U.S. 914 (2000) ..... *passim*

U.S. v. Salerno, 481 U.S. 739 (1987) 3, 4, 5, 6, 7

Webster v. Reprod. Health Services, 492 U.S. 490 (1990) 3

Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1999) 8

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND COURT RULES

IDAHO CODE § 18-609A(5)(c)(i) 12

N.H. RSA 132:24-28 ..... 1, 11

SUP. CT. R. 37.3 1

OTHER AUTHORITIES

Brief of Cross Respondents (Dr. Jane Hodgson, *et al.*), 1989 WL 1127353 11

INTEREST OF AMICUS CURIAE[1]

Amicus is a group comprised of present and former New Hampshire legislators who support the Parental Notification Prior to Abortion Act, N.H. RSA 132:24-28 ("parental notification act").[2] The resolution of the present case will affect future regulations concerning abortion in the State of New Hampshire and throughout the United States. Amicus believes that its perspective will complement the brief of the Petitioner and assist the Court in its decision whether to grant the Writ of *Certiorari*.

SUMMARY OF ARGUMENT

The Courts of Appeals in the nation are in disarray when confronted with the question of what standard of review to employ for facial challenges to abortion regulations. Some require plaintiffs to show that "no set of circumstances exists under which the challenged Act would be valid". Others require a showing of unconstitutionality in a "large fraction" of the cases in which the Act would be applicable. Yet a third group have merely required a single case in which the statute would impinge upon the woman's constitutional liberty interest in terminating her pregnancy before declaring the law unconstitutional.

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[1] No counsel for any party authored any portion of this brief. No persons other than amicus curiae, their members, or their counsel have made a monetary contribution to the preparation and submission of this brief. The written consents of the parties will be filed with the Clerk of the Court pursuant to SUP. CT. R. 37.3.

[2] This brief is submitted on behalf of John S. "Jack" Barnes, Jr., Carl R. Johnson, Maureen Mooney, Russell Prescott, Tony F. Soltani, Fran Wendelboe, and Phyllis Woods, present and former New Hampshire legislators.

"Liberty finds no refuge in a jurisprudence of doubt" as this Court observed in *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 843 (1992). Yet uncertainty is the only responsible answer by a lawyer to the legislator's question, "How will the courts assess this piece of abortion legislation?" And this has been the situation for thirteen years. It is time for the Court to resolve this question.

Of particular importance is the application of the standard of review to parental involvement laws and the presence or absence of a health exception. "Although the Court has held that parents may not exercise 'an absolute, and possibly arbitrary, veto' over that decision [by a minor to terminate her pregnancy], it has never challenged a State's reasonable judgment that the decision should be made after notification to and consultation with a parent." *Hodgson v. Minnesota*, 497 U.S. 417, 445 (1990) (citation omitted).[3] Notwithstanding this straightforward statement by the Court, three states' parental involvement laws have now been struck down due to the application of this Court's reasoning in *Stenberg v. Carhart*, 530 U.S. 914 (2000). It is imperative that the Court grant the writ of *certiorari* in this case in order to establish the necessity and scope of a health exception in a parental involvement law regarding abortion.

[3] *See also Lambert v. Wicklund*, 520 U.S. 292 (1997). "This case [does not] determin[e] the constitutionality of a statute which does no more than require notice to the parents, without affording them or any other third party an absolute veto." *Id.* at 296 n.3, *citing Bellotti v. Baird*, 443 U.S. 622 at 654 n.1 (1979) (Stevens, J., concurring). For an extensive review of Supreme Court precedent on this issue, see *Planned Parenthood of the Blue Ridge v. Camblos*, 155 F.3d 352, 361-67 (4th Cir. 1998).

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE UNCERTAINTY REGARDING THE STANDARD OF REVIEW TO BE APPLIED TO FACIAL CHALLENGES OF ABORTION REGULATIONS THAT HAS PERSISTED FOR THIRTEEN YEARS.

In 1987 this Court summarized the standard for assessing a pre-implementation facial challenge to a validly enacted statute:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenge must establish that no set of circumstances exists under which the Act would be valid. The fact that [a legislative Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment.

U.S. v. Salerno, 481 U.S. 739, 745 (1987). This test has been applied by the Court to the regulation of abortion a number of times. *See Rust v. Sullivan,* 500 U.S. 173, 183 (1991) and *Ohio v. Akron Ctr. for Reprod. Health,* 497 U.S. 502, 514 (1990). *See also Webster v. Reprod. Health Services,* 492 U.S. 490, 524 (1990) (O'Connor, J., concurring in part and concurring in the judgment).

Five years after *Salerno* this Court issued multiple opinions in *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992). With no reference to the *Salerno* standard, Justices O'Connor, Kennedy and Souter reviewed the challenged provisions of the Pennsylvania abortion statute

to determine whether the provisions created undue burdens on the woman's right to terminate a pregnancy in a "large fraction" of the cases involving the statute's applications. 505 U.S. at 895.

In the aftermath of *Casey*, several Justices have written separately to express their individual views on the proper standard of review for facial challenges, some agreeing with the *Salerno* characterization of the standard, others agreeing with the *Casey* characterization of the standard. *Compare Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175 (1996) (concluding that "*Salerno*'s rigid and unwise *dictum* has been properly ignored in subsequent cases") (Stevens, J., concurring in denial of certiorari), *with id.* at 1178-79 (*Casey* "did not purport to change this well-established rule") (quotation omitted) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting from denial of certiorari), *and Ada v. Guam Society of Obstetricians & Gynecologists*, 506 U.S. 1011 (1992) (Scalia, J., joined by Rehnquist, C.J., and White, J., dissenting from denial of certiorari). *See also Fargo Women's Health Organization v. Schafer*, 507 U.S. 1013, 1014 (1993) (O'Connor, J., joined by Souter, J., concurring) (arguing that the "no set of circumstances" standard is incompatible with *Casey*).

A. The Recent Decision of this Court in *Stenberg v. Carhart* Has Exacerbated this Uncertainty.

In *Stenberg v. Carhart*, 530 U.S. 914 (2000) this Court reviewed a facial challenge to a Nebraska statute prohibiting the performance of particular abortion procedures. In considering the absence of a health exception to the statute, Justice Breyer, writing for the majority of the

Court, employed yet a third standard of review, "Nebraska has not convinced us that a health exception is 'never necessary to preserve the health of women.'" *Id.* at 938. Nowhere in the majority opinion does the Court address the reason for this inversion of the *Salerno* standard, requiring the state to show that the statute can always be constitutionally applied, instead of requiring the plaintiff to show that "no set of circumstances exists under which the Act would be valid." *See Salerno*, 481 U.S. at 745. Similarly absent is any reference to the *Casey* standard requiring the plaintiff to show that the statute operates unconstitutionally in a "large fraction" of cases. *Stenberg*, 505 U.S. at 1019-20 (Thomas, J., joined by Rehnquist, C.J. and Scalia, J. dissenting).

Judge Easterbrook has described the dilemma of the lower courts created by this Court's failure to explain its adoption of a third standard of review for facial challenges to abortion regulations:

> Indiana makes much of the fact that its [informed consent for abortion] statute has never been allowed to operate as written. It relies on *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), for the proposition that, except in first amendment cases, a law may be held unconstitutional only when "no set of circumstances exists under which the Act would be valid." Yet in *Stenberg v. Carhart*, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000), without so much as a mention of *Salerno*, the Court held invalid, in a pre-enforcement challenge, an abortion statute that might have been construed by the state courts to have at least some proper applications. This leaves us with irreconcilable directives from the Supreme Court. The Justices have insisted that courts lower in

the hierarchy apply their precedents unless overruled, even if they seem incompatible with more recent decisions. See, e.g., *State Oil Co. v. Khan,* 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997); *Rodriguez de Quijas v. Shearson/ American Express, Inc.,* 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). When the Justices themselves disregard rather than overrule a decision – as the majority did in *Stenberg,* and the plurality did in *Casey* – they put courts of appeals in a pickle. We cannot follow *Salerno* without departing from the approach taken in both *Stenberg* and *Casey*; yet we cannot disregard *Salerno* without departing from the principle that only an express overruling relieves an inferior court of the duty to follow decisions on the books.

A Woman's Choice – E. Side Women's Clinic v. Newman, 305 F.3d 684, 687 (7th Cir. 2002), *cert. denied*, 537 U.S. 1192 (2003).

B. Three Standards of Review are Currently Being Applied to Abortion Regulation by Lower Courts.

Prior to *Stenberg*, the federal courts of appeals were divided over the question of whether *Casey* modified the *Salerno* standard. The Fourth and the Fifth Circuits have continued to apply *Salerno*. "[W]e do not interpret *Casey* as having overruled, *sub silentio,* longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes." *Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir. 1992), *cert. denied,* 506 U.S. 1021 (1992). *Accord Causeway Med. Suite v. Ieyoub,* 109 F.3d 1096, 1102-04 (5th Cir. 1997) ("As far as we can tell, the Court

appears to be divided 3-3 on the *Salerno-Casey* debate, and it would be ill-advised for us to *assume* that the Court will abandon *Salerno* because three members of the Court now desire that result"), *cert. denied,* 118 S. Ct. 357 (1997). The Fourth Circuit also applies *Salerno*.

> We begin by emphasizing, as we did in *Bryant I,* that the challenge to [the abortion clinic regulation] is a facial one and therefore "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). To show the necessary respect to legislative departments, particularly in light of Article III's limitation of judicial power to cases and controversies, we require evidence – as opposed to speculation – sufficient to rebut the regulation's presumptive constitutionality.

Greenville Women's Clinic v. Comm'r, S.C. Dept. of Health & Envtl. Control, 317 F.3d 357, 362 (4th Cir. 2002), *cert. denied,* 538 U.S. 1008 (2003). *See also Manning v. Hunt,* 119 F.3d 254, 268-69, n.4 (4th Cir. 1997) ("the reasoning of the Fifth Circuit [regarding this lower-court conflict of authority] appears to be most persuasive").

Six circuits have applied the "large fraction" test of *Casey*. *See A Woman's Choice – E. Side Women's Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002) (holding undue burden standard, instead of *Salerno* standard, applies in abortion context after *Casey*), *cert. denied*, 537 U.S. 1192 (2003); *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 142-43 (3d Cir. 2000) (same); *Planned Parenthood of S. Ariz. v. Lawall*, 180 F.3d 1022, 1025-26 (9th Cir.

1999) (same), *amended on denial of reh'g*, 193 F.3d 1042 (9th Cir. 1999); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 193-96 (6th Cir. 1997) (same), *cert. denied*, 523 U.S. 1036 (1998); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996) (same), *cert. denied, sub nom*; *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456-58 (8th Cir. 1995) (same), *cert. denied sub nom*.

Notwithstanding the Court of Appeals for the Tenth Circuit's prior adoption of the *Casey* standard for review of facial challenges to abortion regulations, that court recently applied the *Stenberg* test in its review of the emergency exception to a Colorado parental notice law. "Applying [the *Stenberg*] standard, if we conclude that the record shows that there is no genuine issue as to the material fact that the PNA will infringe on the ability of *any* pregnant woman to protect her health, we must hold the statute unconstitutional." *Planned Parenthood of Rocky Mountains Services, Corp. v. Owens*, 287 F.3d 910, 919 (10th Cir. 2002) (emphasis in the original). *See also Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 923 (9th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3338 (U.S. Nov. 24, 2004) (No. 04-703).

Similarly, the federal district court for Delaware applied the *Stenberg* test when reviewing a statute requiring a 24-hour waiting period prior to the performance of an abortion. "[W]hether the statute poses an obstacle to one Delaware woman or thousands does not change the constitutional analysis." *Planned Parenthood of Del. v. Brady*, 2003 WL 21383721 (D.Del. 2003).

Regardless of one's view as to what the proper test is for review of facial challenges to abortion regulations, it is increasingly difficult to avoid the conclusion that the

question of what standard of review should be applied to facial challenges of abortion regulations "cries out for [this Court's] review." *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1178 (1996) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting from denial of certiorari).

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE NECESSITY AND SCOPE OF A HEALTH EXCEPTION TO PARENTAL INVOLVEMENT LAWS.

The Courts of Appeals for the First, Ninth, and Tenth Circuits have interpreted *Stenberg v. Carhart*, 530 U.S. 914 (2000) as creating a *per se* requirement of a health exception to parental involvement laws. *Planned Parenthood of Northern New England v. Heed*, 390 F.3d 53, 58-59 (1st Cir. 2004), *petition for cert. filed*, (U.S. Feb. 22, 2005) (No. 04-1144); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 923 (9th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3338 (U.S. Nov. 24, 2004) (No. 04-703); and *Planned Parenthood of Rocky Mountains Services, Corp. v. Owens*, 287 F.3d 910, 919 (10th Cir. 2002). Yet none of these cases involve laws banning any abortion procedure. The Idaho case involves an emergency exception substantially similar to that approved by this Court in *Casey*. The remaining two cases contain emergency exceptions virtually identical to the Minnesota statute reviewed and approved by this Court in *Hodgson v. Minn.*, 497 U.S. 417 (1990). Notwithstanding the absence of a health exception in the Minnesota statute, there is no evidence of any harm to Minnesota minors in the fifteen years the statute has been in effect.

The relevant precedent that should have guided the evaluation of the New Hampshire statute in the present case, as well as the Colorado Parental Notification Act in *Planned Parenthood of Rocky Mountains Services, Corp. v. Owens*, 287 F.3d 910 (10th Cir. 2002) is *Hodgson v. Minn.*, 497 U.S. 417 (1990) since all three cases involved the constitutionality of parental notification laws. In *Hodgson*, this Court reviewed a Minnesota statute that provided in pertinent part:

> No notice shall be required under this section if:
>
> (a) The attending physician certifies in the pregnant woman's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice;

Id. at 426, n.7. Like the plaintiffs-respondents in the present case, plaintiffs in *Hodgson* challenged the sufficiency of the emergency exception.

> Subdivision 4(e) of the statute provides an exception for minors whose health is so endangered that her doctor can certify she will die within three days. Specifically, subdivision 4(a) states that no notice is required if the attending physician certifies the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice. By the terms of the statute, the procedure may be performed 72 hours after notice is mailed. But, unless the doctor can state the minor will die within those three days, it is presumed that there is sufficient time to notify the parents. This exception does not help minors whose health problems warrant immediate abortions but whose lives cannot be certified to be so imminently endangered.

Brief of Cross Respondents (Dr. Jane Hodgson, *et al.*), 1989 WL 1127353, at *15, n.29. Notwithstanding this challenge, this Court upheld the Minnesota law as a two-parent notification law with a judicial bypass. *See Hodgson* at 448-49.[4]

There is no legally significant difference in the emergency exceptions of the New Hampshire and Colorado statutes when compared with the exception contained in the Minnesota statute before the Court in *Hodgson*. The New Hampshire statute provides in pertinent part, "No notice shall be required under RSA 132.25 if: (a) The attending abortion provider certifies in the pregnant minor's medical record that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice." The Colorado Parental Notification Act provided an affirmative defense to liability under the Act when "[t]he abortion was performed to prevent the imminent death of the minor child and there was insufficient time to provide the required notice." *Planned Parenthood of Rocky Mountains Services*, 287 F.3d 910, 916 (10th Cir. 2002).

In *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 923 (9th Cir. 2004), the Court of Appeals for the Ninth Circuit rejected the health exception in a parental consent law as constitutionally infirm:

> "Medical emergency" is in turn defined as a sudden and unexpected physical condition which, in the reasonable medical judgment of any ordinarily prudent physician acting under the

[4] The continuing viability of *Hodgson* is evidenced by its citation in *Lambert v. Wicklund*, 520 U.S. 292 (1997) (per curiam).

circumstances and conditions then existing, is abnormal and so complicates the medical condition of the pregnant minor as to necessitate the immediate causing or performing of an abortion:

1. To prevent her death; or

2. Because a delay in causing or performing an abortion will create serious risk of immediate, substantial and irreversible impairment of a major physical bodily function of the patient.

Id. at 924, citing IDAHO CODE § 18-609A(5)(c)(i). However, as the district court held "sudden" can be construed to refer to the moment of diagnosis of the condition, not the condition itself; "unexpected" to the physician's inability to know precisely when the medical condition would become acutely emergent; and "abnormal" to the fact that in an ordinary pregnancy there is no need for an abortion. As thus interpreted, the statute is no more restrictive than the medical emergency provision upheld by this Court in *Casey,* 505 U.S. at 880. *Wasden*, 376 F.3d at 915.

Each of these regulations protects differing state interests than those at issue in *Stenberg*. As this Court has long recognized, parental involvement laws promote the health and safety of minors. Parents are far more likely to be able to identify and secure the assistance of ethical and qualified abortion providers. *Bellotti v. Baird*, 443 U.S. 622, 641 (1979) They are also able to "provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data." *H.L. v. Matheson*, 450 U.S. 398, 411 (1981). These interests simply were not present in *Stenberg*.

At issue in *Stenberg* was an attempt to *ban* altogether a method of abortion. Such statutes are entirely different than parental involvement laws, which obviously do not purport to ban abortions, but simply seek to promote the interests of minors in having the benefit of parental involvement.

In fact, *Stenberg* itself repeatedly makes this distinction plain. *See Stenberg*, 530 U.S. at 930 ("The Nebraska law, of course, does not directly further an interest in the potentiality of human life by saving the fetus in question from destruction, as it regulates only a *method* of abortion") (emphasis in original) (quotation omitted); *id.* at 931 ("this Court has made clear that a State may promote but not endanger a woman's health when it regulates the *methods* of abortion") (emphasis added); *id.* ("Our cases have repeatedly invalidated statutes that in the process of regulating the *methods* of abortion, imposed significant health risks.") (emphasis in original). Thus, to the extent the Constitution requires a health exception, the requirement set forth in *Stenberg* is limited to those statutes which attempt to ban the abortion procedure altogether.

The application of *Stenberg* to parental involvement statutes generally is flawed in two ways. First, the decisions simply cannot be reconciled with a careful reading of what Justices O'Connor, Kennedy and Souter set forth in *Casey* or with the cases that preceded it. None of the lower courts applying *Stenberg* to parental involvement laws have meaningfully considered *Hodgson*. The lower court opinions make no attempt to explain how the Minnesota parental notification act somehow survived constitutional review, but the similar statutes do not. More fundamentally, the opinions are utterly devoid of any discussion of the important interests of minors in parental notification,

and fail to give any consideration to the reciprocal interests of parents and families, as set forth by Justice Stevens in *Hodgson* and endorsed by Justices O'Connor, Kennedy, and Souter in *Casey*.

Second, in spite of the *Casey* Court's acknowledgment that the Court previously had gone "too far" by "striking down . . . abortion regulations which in no real sense deprived women of the ultimate decision," *Casey*, 505 U.S. at 875, the lower courts are now rendering decisions that place even more restrictions on states than that in the pre-*Casey* era. Absent an intention by this Court – less than ten years after *Casey* – to overrule its prior recognition of the substantial state interest in potential life throughout pregnancy, it is imperative to clarify the requirement of a health exception in *Stenberg*.

CONCLUSION

For all the foregoing reasons, this case warrants the exercise of this Court's *certiorari* jurisdiction. Amicus respectfully urges this Court to grant the petition for Writ of *Certiorari*.

Respectfully submitted,

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